SUPREME COURT, U. S.
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In the

Supreme Court of the United States

October Term, 1972

No. 72-1422

Pepsi-Cola Bottling Company of Corvallis, Inc.,

Petitioner,

—v.—

Federal Trade Commission, Lewis J. Engman, Paul Rand Dixon, A. Everette MacIntyre, Mary Gardiner Jones, David S. Dennison, Jr., individually and as Commissioners of the Federal Trade Commission,

Respondents.

REPLY BRIEF FOR PETITIONER PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC. ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Pepsi-Cola Bottling Company of Corvallis, Inc. ("Pepsi-Corvallis") submits this brief in reply to respondents' memorandum in opposition to the separate petitions for writs of certiorari to the Courts of Appeals for the Second and Fifth Circuits filed by Pepsi-Corvallis and PepsiCo, and by Coca-Cola Company and various intervenors, respectively.

The Government Brief Reveals The Conflict Between The Second And Fifth Circuits And Fails To Address Itself To The Denial Of Due Process Identified By Judge Medina And Pepsi-Corvallis.

There is a distinct conflict between the Second and Fifth Circuits on the problems raised by this petition which the Government's memorandum in opposition makes manifest. Moreover, the Government does not dispute that those problems are of national importance.

The Government takes the position that the Second Circuit's ruling that *absent Pepsi* bottlers will be *bound* eliminates the risk to PepsiCo of multiple litigation and at the same time contends that the Fifth Circuit preserves to *Coca-Cola* bottlers the opportunity for just such multiple litigation.

No attempt is made to resolve the evident inconsistency in this position or to deal with the fact that the courts are treating *Pepsi* bottlers and their principal competitors in different and discriminatory ways.

Nowhere does the Government address itself to the petition of Pepsi-Corvallis or the plight of other absent *Pepsi* bottlers who now must elect, according to the Second Circuit, either to intervene in these complex antitrust proceedings or to stay out and be bound by the results. The claim of denial of due process to Pepsi-Corvallis, which was the subject of an eleven-page dissent by Judge Medina below, does not receive even a one-line comment from the Solicitor General.

Surely a constitutional issue which profoundly affects an entire national industry and which at least one highly-respected judge has found to be of great significance deserves to be briefed by the Government.

Does the Government deny that the absent Pepsi *bottlers will be deprived of due process of law by the novel concepts of the Second Circuit?*

Does the Government dispute Judge Medina's conclusion that there is a serious constitutional question here?

Does the Government believe that mandatory obligations may be imposed on non-parties to an agency proceeding?

These are important questions of policy and law which should not be "swept under the rug." *

The Eighth Circuit Decision Further Exposes The Conflict Among The Circuits.

Subsequent to the filing of the petition herein, the United States Court of Appeals for the Eighth Circuit decided *Seven-Up Co.* v. *Goodhope.*** Faced with the conflict between the Second Circuit and the Fifth Circuit, the Eighth Circuit expressly chose to follow the reasoning of the latter:

> "The Coca-Cola Company and PepsiCo, Inc., * * * have both unsuccessfully presented the identical claim to the Fifth and Second Circuit. * * * *We particularly agree with the reasoning of the Fifth Circuit* and likewise hold that the action was properly dismissed for lack of subject matter jurisdiction." (2a) (emphasis added)

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* Medina, J., 472 F.2d at 193, Petition for Certiorari of Pepsi-Corvallis at 24a.

** (Eighth Cir. Docket No. 72-1630 filed May 31, 1973). A copy of the Eighth Circuit's opinion, which has not been officially reported at the time of the filing of this brief, is annexed hereto as an Appendix. References to pages in the Appendix will be cited in the form "—a."

The Eighth Circuit thus rejected the Second Circuit's novel concept that absent bottlers could be bound *in personam* by any order entered in the FTC proceeding.

As a result, Pepsi-Corvallis and other *Pepsi* bottlers in the Second Circuit will be bound by the outcome of the FTC proceedings (although they are *not* parties thereto) and will be subject to any FTC order rewriting their franchise agreements, while *Coca-Cola, Seven-Up* and even other *Pepsi* bottlers in the Fifth, Eighth and other Circuits will not.

Prompt resolution of the conflict thus illuminated by the Eighth Circuit and by the Government's memorandum is required in the national interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should in all respects be granted.

Dated: New York, New York
June 25, 1973

Respectfully submitted,

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